Stannah Stairlifts, Inc. *and* Local 4, International Union of Elevator Constructors, AFL–CIO. Case 1–RC–20418

April 8, 1998

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On December 8, 1997, Administrative Law Judge Robert T. Wallace issued the attached decision. The Petitioner filed exceptions and a supporting brief. The Employer filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the election be set aside and that this proceeding be remanded to the Regional Director for Region 1 to conduct a second election when she deems that the circumstances permit a free choice.

[1] The Petitioner has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge stated that he did not resolve the issue of whether Leo Locurto was an agent of the Petitioner. The judge assumed arguendo that Locurto was not an agent, and applied a third-party standard. We agree with the judge. We find that Locurto's ''misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.'' *Westwood Horizons*, 270 NLRB 802 (1984). We note that this test does not hinge on the subjective reactions of the prospective voters in a particular election. The ultimate standard to be applied is objective, not subjective.

[3] In the absence of exceptions, we adopt pro forma the judge's recommendation that Objection 2 be overruled.

Don Firenze, Esq., for the General Counsel.
John F. Adkins and *Sandra E. Kahn, Esqs. (Bingham Dana LLP)*, of Boston, Massachusetts, for the Respondent.
Paul Kelly, Esq. (Segal, Roitman & Coleman), of Boston, Massachusetts, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case, together with another entitled Case 1–CA–33867, was the subject of a decision issued by me on June 13, 1997, in which I recommended dismissal of the complaint in the CA case. That determination was upheld by the Board in a Decision and Order issued on October 31, 1997 (324 NLRB No. 141). In the same document, however, the Board severed the instant RC case and remanded it for determination of Respondent's election objections.

Those objections are twofold: (1) That employee Leo Locurto's conduct, particularly on the morning of February 23, 1996, created a general atmosphere of fear and reprisal that rendered a free election impossible and (2) that the Union sought to buy the vote of another employee, Joseph Panzera.

As found in the affirmed initial decision, Locurto engaged in a loud verbal altercation with another employee (Tony Cardarelli) at Respondent's warehouse/office on February 23. During the course of that altercation, Locurto screamed at Cardarelli:

> I'm going to get a van full of niggers to come down and kick the shit out of all you Englishmen. I'll hunt you down. They will find you dead somewhere. That's the way the Sicilians do it.

I find merit in Objection 1.

Respondent Company is a wholly owned subsidiary of a company based in England, Stannah Stairlifts, Ltd. A number of executives in the subsidiary are residents of England.

The total complement of hourly workers employed by Respondent at pertinent times is four. Of those, three (including Locurto) manifested their prounion leanings by signing authorization cards and openly talking up the Union while at work. The fourth hourly employee is Cardarelli, an individual known by Locurto to have sided with the Company in its opposition to unionization.

Prior to the altercation, Cardarelli had been shunned and made the butt of jibes by the other three and had ample reason to believe those actions, as well as a number of harassing incidents (''hang up'' calls, missing personal tools, and vandalism toward signs he had made and placed), were due to his procompany stance.

With that background, it is apparent that Locurto's reference to ''Englishmen'' was a code word meaning those employees who sided with the Company in resisting unionization. Accordingly, Locurto was threatening to ''kick the shit out of and kill'' Cardarelli and any other employee who opposed unionization.

That threat was made within earshot of the entire four-man unit and shortly before the representation election. It was never repudiated by the organizing union. The Union won the election by a vote of 2 to 1, Locurto's vote having been excluded in the CA case.

There is no need to speculate on whether the two who voted for the Union were in fact intimidated. The language used by Locurto must be tested under an objective standard.[1] His threats to ''kick the shit out of'' and ''kill'' any ''Englishmen'' who opposed unionization, made in front of the entire bargaining unit, were so serious as to warrant invalidation of the election;[2] and the likelihood of intimidation is

[1] *Electra Food Machinery*, 279 NLRB 279 (1986).

[2] *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *Sonoco of Puerto Rico, Inc.*, 210 NLRB 493 (1974); and *Lovilia Coal Co.*, 275 NLRB 1358 (1985).

magnified by the fact that the unit involved was small and that the Union prevailed by one vote.[3]

I need not find that Locurto was a formal agent of the Union in circumstances where, as here, he was an open supporter of the Union and it knew of his threats, and had ample opportunity to repudiate them but failed to do so.[4]

In view of the above, I shall Order that the election be, and it is, set aside; and the matter is remanded to the Regional Director for Region 1 to conduct a second election when she deems the circumstances permit a free choice;[5] and that Objection 2 is dismissed because it is not supported by substantial evidence.

[3] *Buedel Food Products Co*., 300 NLRB 638 (1990); and *Smithers Tire*, 308 NLRB 72 (1992).

[4] *NLRB v. Urban Telephone Corp*., 499 F.2d 239, 244 (7th Cir. 1974); *Hickman Harbor Service v. NLRB*, 739 F.2d 214 (6th Cir. 1984); and *Bristol Textile Co*., 277 NLRB 1637 (1986).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.